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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Petition for Waiver)
of AirTouch Paging)
of Sections 64.1300(c) and (d))
of the Commission's Rules)

CC Docket No. 96-128

To: The Chief, Common Carrier Bureau

**REPLY TO OPPOSITIONS
TO PETITION FOR WAIVER**

AirTouch Paging ("AirTouch"), by its attorneys and pursuant to the Commission's *Public Notice*, DA 97-2735, released December 31, 1997, hereby replies to the Oppositions to AirTouch's Petition for Waiver (the "Petition"). The following is respectfully shown:

The AirTouch Petition seeks a limited, temporary waiver of AirTouch's obligation to pay per-call compensation to any payphone service provider ("PSP") unless and until that PSP provides payphone-specific coding digits ("Coding Digits") and AirTouch is able to selectively block calls from payphones operated by that PSP. Petition at 5. The Petition, which AirTouch supplemented in Comments filed January 15, 1998, demonstrated that special circumstances, including the harm that will be suffered by AirTouch, justify granting its request, which seeks reciprocal treatment to that accorded PSPs. AirTouch has shown that such reciprocal treatment is justified, both on grounds of fundamental fairness and in the public interest.

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The only opposition to AirTouch's request is from parties representing the interests of payphone service providers ("PSPs").^{1/} These parties misunderstand the legal and factual basis for the request. Because these oppositions present no compelling arguments or evidence against grant of the limited relief sought by AirTouch, AirTouch requests that the Bureau promptly grant the Petition.

I. The Commission Has Expressly Made Transmission of Coding Digits by PSPs a Prerequisite to their Receipt of Compensation

More than 14 months ago, the Commission ordered PSPs "to transmit specific payphone coding digits as a part of their ANI" and specifically made compliance with this requirement a condition to PSPs "be[ing] eligible for [per-call] compensation."^{2/} Although they did not seek formal reconsideration of this requirement, the PSPs have attempted to avoid it as a condition of payment. On September 30, 1997 — just one week before PSPs' Coding Digit obligations were to become effective — the LEC ANI Coalition^{3/} asked the Commission to allow PSPs to receive payment while waiving the deadline indefinitely pending "clarification" of those obligations.^{4/} Similar requests were filed by other PSPs on

^{1/} All of the other commenting parties support the AirTouch Petition. See Comments of American Alpha Dispatch *et al.* at 1; Comments of PageMart Wireless, Inc. at 2; Comments of Mobile Telecommunications Technologies Corp. at 2.

^{2/} *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Order on Reconsideration*, 11 FCC Rcd 21,233 (1996), para. 64.

^{3/} AirTouch assumes that the members of the LEC ANI Coalition — Ameritech, Bell Atlantic, BellSouth, GTE, NYNEX, SBC, SNET, and U S West — also are members of the "RBOC/GTE/SNET Coalition" which has opposed AirTouch's Petition, but whose participants were not named in their Opposition.

^{4/} See *Public Notice, Pleading Cycle Established for Petitions to Waive Payphone*
(continued...)

October 1, 1997.^{5/} These requests, which were opposed, have not been acted upon.

Nonetheless, just one week later, the Common Carrier Bureau, on its own motion, effectively granted the relief sought by the PSPs, allowing them to receive per-call compensation without transmitting Coding Digits.^{6/}

This background is necessary to put in perspective the oppositions to the AirTouch Petition filed by the American Public Communications Council (“APCC”) and the RBOC/GTE/SNET Coalition (the “RBOC Coalition”). Neither APCC nor the RBOC Coalition even acknowledge that they have Coding Digit obligations, that those obligations were ordered by the Commission as a condition to their receipt of compensation, or that they have pending requests for further relief from those obligations.

APCC and the RBOC Coalition also exhibit a fundamental misunderstanding of Section 276 of the Communications Act. Section 276 required the Commission to adopt rules that provide PSPs are “fairly compensated” while also promoting competition in the payphone industry.^{7/} The statute did not establish a deadline by when payments were required to begin, as the PSPs apparently believe, but a deadline by which the Commission must adopt compensation requirements ensuring fair compensation.^{8/} The Commission’s ruling that transmission of Coding Digits is a prerequisite to compensation rights —

^{4/} (...continued)

Coding Digits Requirements, DA 97-2214, released October 20, 1997, para. 3.

^{5/} *See id.*, paras. 2, 4.

^{6/} *Order*, DA 97-2162 (Com. Car. Bur., released October 7, 1997) (“*Waiver Order*”).

^{7/} 47 U.S.C. § 276(b)(1)(A).

^{8/} 47 U.S.C. § 276(b)(1).

unambiguously set forth in the *Order on Reconsideration* — is entirely consistent with the statutory requirement that the compensation plan be “fair”. Congress understood that it could not simply order compensation to begin; rather, it required the Commission to proceed expeditiously (by October 1996) to adopt rules, but left it to the Commission to determine what is “fair”, to set conditions for payment to PSPs of a “fair” compensation amount, and to say when payments must begin.^{9/}

It is, therefore, undisputed that PSPs are required to transmit Coding Digits as a condition to receipt of per-call compensation. Indeed, the PSPs would not have filed their own waiver requests were this not the law. AirTouch’s Petition is premised on PSPs having received a waiver of their obligations — *i.e.*, they have been permitted to receive per-call compensation without complying with their obligations to transmit Coding Digits — and the resulting harm of having to pay compensation charges without the the ability to selectively block calls in order to avoid paying those charges. Notwithstanding the RBOC Coalition’s assertions,^{10/} these plainly constitute special circumstances which justify a reciprocal, limited waiver for AirTouch, as shown in the Petition. It is ludicrous for any PSP to assert, as does the RBOC Coalition, that the inability to block calls is not a special circumstance when the

^{9/} It is not AirTouch that ignores fundamental principles, as the RBOC Coalition asserts. RBOC Coalition Opposition at 6. Rather, the RBOC Coalition fails to understand that the Commission, following the instructions of Congress, determined that compensation is “fair” only when the ability to block an unwanted call is present. Nothing is more fundamental to basic market economics, as the Court of Appeals emphasized when it upheld the Commission’s “market-based” compensation scheme. *See Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555, 566-67 (1997) (“IPTA”). Selective call blocking is possible only when Coding Digits are transmitted; thus, it was fair for the Commission to expressly order Coding Digits as a prerequisite to per-call compensation.

^{10/} RBOC Coalition Opposition at 4-5.

inability to provide Coding Digits was the special circumstance that justified their own waiver.^{11/}

II. AirTouch Cannot Be Required to Incur a Cost that It Cannot also Avoid

The RBOC Coalition asserts that AirTouch's request is "nonsense" because, according to the Coalition, AirTouch has no "obligation to pay per-call compensation."^{12/} This argument is curious for two reasons. First, AirTouch is seeking a waiver of compensation obligations only in narrow circumstances (i.e., where a PSP does not transmit Coding Digits and AirTouch cannot selectively block calls). If the RBOC Coalition believes AirTouch has no payment obligations, then one would expect them to support, not oppose, AirTouch's request. Second, the RBOC Coalition proceeds to contradict itself, stating that AirTouch is "require[d]" to "pay fair compensation for the payphone services it chooses to consume."^{13/}

The reason for the RBOC Coalition's confusion is its own simplistic approach to the complexities of the Commission's attempt to introduce market discipline to the payphone industry (a radical departure from the monopoly subsidized payphone operations to which the Coalition's members have been accustomed). The RBOC Coalition's view is that all compensation issues involve PSPs and IXC's only; as a result, it has not recognized that 800 subscribers such as AirTouch are legitimately harmed.

^{11/} *Id.* at 4.

^{12/} *Id.* at 3.

^{13/} RBOC Coalition Opposition at 7.

The Coalition's arguments also are misleading with respect to why call blocking is important. AirTouch's customers have indicated they do not want to pay per-call compensation. In fact, as of this date, approximately 76% have chosen not to accept calls from payphones to their 800 pager number. With no ability to block these calls, AirTouch incurs a liability which it can neither avoid nor pass on to its customers.^{14/} This result is directly contrary to both the Commission's and the Court of Appeals' justification for the per-call compensation scheme, as stated by the Court:

The Commission ... concluded that the party incurring the cost could avoid it.... [Order on] *Reconsideration*, ¶ 66.... Thus, a "buyer" (the carrier or the 800 service subscriber) will have the option of rejecting a "seller's" (the PSP) excessively priced service.^{15/}

AirTouch — an 800 service subscriber, or "buyer" of a PSP's service — should not be denied the ability to avoid incurring costs imposed by the PSP. That is why a waiver is necessary where blocking is not available; indeed, but for the Commission's own justification of its payphone compensation scheme on the basis of the buyer's ability to avoid unwanted costs, the Court would not have upheld that scheme. Until a PSP supplies Coding Digits, AirTouch should not be forced to incur the costs of the PSP's services.

III. Call Blocking is a Fundamental Element of Both the Default and Permanent Payphone Compensation Rules

Virtually all of APCC's Opposition is premised on the erroneous belief that transmission of Coding Digits (which are necessary for selective call blocking) is not a

^{14/} Of course, if PSPs do not intend to charge for such calls, then AirTouch agrees with APCC that AirTouch will not incur charges and will not be harmed. APCC Opposition at 4. If, however, PSPs do intend to collect such charges, AirTouch should not be forced to absorb them.

^{15/} *IPTA*, 117 F.3d at 566-67 (emphasis added).

prerequisite for receiving per-call compensation for the period between October 1997 and October 1999 pursuant to Section 64.1300(d) of the Commission's Rules.^{16/} APCC cites no legal authority for this claim, and nothing in the Commission's *Payphone Orders* can be construed as providing that the right of carriers to block calls applies only after PSPs' "default" per-call compensation rights cease and Section 64.1300(a) of the Rules becomes fully effective. Call blocking and compensation are reciprocal and co-existing rights, regardless of whether Section 64.1300(a) or Section 64.1300(d) of the Rules applies.

APCC also would have the Commission believe that blocking of calls charging \$0.284 is not necessary because there is a presumption that rate is not excessive.^{17/} However, the Rules currently state that the \$0.284 per-call rate — which is the subject of numerous petitions for reconsideration and is likely to be further adjusted — is the default rate only "in the absence of an agreement." 47 C.F.R. § 64.1300(d). The Commission plainly would not, and did not, foreclose negotiation of a lower rate. No PSP has an unconditional right to collect \$0.284, or any other amount, for a call placed from its payphone, and blocking of such calls — no matter what the charge — is an unassailable right. Because of circumstances not under its control, AirTouch has been deprived of that right.

^{16/} See APCC Opposition at 2-4.

^{17/} See APCC Opposition at 2-3 ("The 1997-99 compensation rate is prescribed at the uniform level of 28.4 cents per call, and is not subject to the local rate-setting decisions of each individual [PSP]. Therefore, there is no necessity for carriers or their customers to block calls in order to protect themselves against possibly exorbitant rates."). The Court of Appeals would reject this argument out of hand. See *IPTA*, 117 F.3d at 567 (upholding the carrier pays compensation scheme based on the Commission's representations that "a 'buyer' (the carrier or the 800 service subscriber) will have the option of rejecting a 'seller's' (the PSP) excessively priced service.")

IV. The Petition Is Narrowly Tailored for Specific Circumstances

The RBOC Coalition concedes that AirTouch's request applies only to those payphones that do not transmit Coding Digits, acknowledging that the relief sought by AirTouch applies only to "a minority of payphones".^{18/} Nonetheless, the RBOC Coalition, and APCC, attempt to portray AirTouch as a "free rider", unwilling to pay any compensation.^{19/} AirTouch finds these arguments singularly devoid of merit. It is necessary only to compare APCC's and the RBOC Coalition's demands for both compensation and relief from Coding Digit obligations, to AirTouch's request for limited relief only with respect to PSPs who are not able to provide Coding Digits, to show how dramatically they overstate their case.

Similarly, assertions by APCC and the RBOC Coalition that the AirTouch Petition raises arguments already ruled upon by the Bureau^{20/} are a smokescreen. The earlier ruling cited by APCC and the RBOC Coalition involved a motion for stay of the compensation rules, and the legal requirements for a stay of agency action are substantially different than those applicable to a request for waiver.^{21/} In acting on the Personal Communications Industry Association's Motion for Stay, the Bureau was required to

^{18/} RBOC Coalition Opposition at 6.

^{19/} RBOC Coalition Opposition at 8; APCC Opposition at 5.

^{20/} See APCC Opposition at 2; RBOC Coalition Opposition at 6-7.

^{21/} As the RBOC Coalition notes, a waiver petitioner must show that "special circumstances warrant a deviation from the general rule, and such deviation will serve the public interest." RBOC Coalition Opposition at 4 (quoting *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990)). Furthermore, the circumstances must be ones that were not present or considered when the rule was adopted. AirTouch has satisfied this standard.

determine whether PCIA was likely to prevail on the merits of its appeal to the U.S. Court of Appeals.^{22/} No such showing is required of AirTouch.^{23/} Furthermore, the Bureau ruled that PCIA had failed to submit “concrete, credible evidence” of harm; AirTouch has shown particular harm to its interests.^{24/} Moreover, while “economic loss does not, in and of itself, constitute irreparable harm” for purposes of a stay,^{25/} it is clear that economic loss of the kind demonstrated by AirTouch can justify a waiver. Indeed, it was precisely a concern over PSP’s economic losses that was found to justify waiver of their Coding Digit obligations.^{26/} Finally, the Bureau ruled that PCIA’s request was too broad, because it covered all payphones. Again, the AirTouch Petition is readily distinguishable, applying to only a “minority of payphones.”^{27/} The Oppositions do not consider, or address, these obvious differences.

^{22/} See *Memorandum Opinion and Order*, CC Docket No. 96-128, DA 97-2622 (Com. Car. Bur., released December 17, 1997).

^{23/} The RBOC Coalition states that AirTouch “gives the Commission no reason to reconsider” the conclusions made in the order denying PCIA’s stay request. While it is obvious that the RBOC Coalition is trying to blur the differences between the PCIA request and the AirTouch Petition in order to effect a similar outcome, AirTouch points out that it has not sought, and does not need to seek, reconsideration of that order.

^{24/} See Petition for Waiver at 7-12; AirTouch Paging Comments on Petition for Waiver, January 15, 1998, at 1-3. AirTouch notes that to the extent that the parties that support its Petition seek similar relief based upon circumstances demonstrated to be comparable to those shown by AirTouch, an identical waiver would be justified.

^{25/} *Wisconsin Gas Co. v. FERC*, 758 F.2d 669- 674 (D.C. Cir. 1985).

^{26/} *Waiver Order* at para. 13.

^{27/} RBOC Coalition Opposition at 6. The PSPs have indicated in other contexts that the number of payphones without Coding Digits abilities is decreasing, which further limits the scope of AirTouch’s request.


WHEREFORE, the foregoing premises duly considered, AirTouch Paging respectfully requests that the Chief, Common Carrier Bureau, immediately grant AirTouch Paging's request for limited relief.

Respectfully submitted,

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January 22, 1998

CERTIFICATE OF SERVICE

I, Sharon L. Henry, a secretary in the law firm of Paul, Hastings, Janofsky & Walker LLP, do hereby certify that copies of the foregoing "Reply to Oppositions To Petition for Waiver" were sent on January 22, 1998, via first-class mail to the following:

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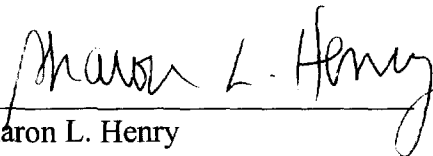
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